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RECENT IMPORTANT DECISIONS

BANKRUPTCY—ACTION BY TRUSTEE—RIGHT OF SET-OFF.—The Trustee of a bankrupt estate brought an action against the defendant to recover a sum due the estate on a contract entered into between the bankrupt and the defendant. The action was brought after the time limited by § 57 n of the Bankruptcy Act for proving claims against the estate. To defeat the action, defendant set up as a counterclaim the damages he had sustained from a breach of the contract by the bankrupt which claim had not been proved against the estate. *Held,* he was not precluded from setting up such a counterclaim. *Norfolk & W. Ry. Co.* v. *Graham* (1906), C. C. A., Fourth Circ., 145 Fed. Rep. 809

The contention was that the counterclaim, although, provable in its nature, was not proved in the bankruptcy proceedings within the time allowed by § 57 n, and was therefore not such a counterclaim as could be set off. This section reads: "Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication." In passing on this the court said: "This section relates merely to the proof and allowance of claims against the bankrupt in the bankruptcy proceedings. But we find no warrant for holding that his failure to thus prove it is a bar to the use of such claim in diminution of, or to defeat the claim of the trustee when asserted in an independent action. We think the true solution of the question is that the counterclaim which may be set off in an independant action brought by the trustee is, subject to § 68 b, one that is provable in its nature, and need not necessarily be one that has been or may yet be proved in the bankruptcy proceedings." The section referred to reads: "A counterclaim or set-off shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate."

In COLLIER ON BANKRUPTCY, 5th Ed. p. 541, it is said: "Strictly the time when the right to set-off is determined is the time when the petition is filed." The court's conclusion seems to be just, for this was a claim provable at the time the petition was filed. Besides any other rule might work an injustice to a debtor, who was also a creditor of the estate, for if from a lack of knowledge of the proceedings, or for any other reason he neglected to prove his claim against the estate, and the trustee delayed bringing an action until after the time limited for proving claims, he would be entirely precluded from setting up his claim and would become a mere debtor of the bankrupt.

BILLS AND NOTES—FORGED CHECK—PAYMENT—RECOVERY BACK.—Defendants had received and paid a check, drawn on the plaintiffs, which was endorsed in blank to the defendants. The signature of the drawer was forged. It was transmitted in the usual course of business through several banks and finally paid by plaintiffs without discovery of the forgery. The supposed drawer discovered the forgery some time later and refused to allow credit to plaintiffs for the amount of the check. They immediately notified defendants, returning the check at the same time. Defendants refused to refund. *Held,* a drawee who has by mistake paid a forged check may recover the money paid unless the party receiving the money has been misled

to his prejudice by the drawee's mistake. *First National Bank of Lisbon* v. *Bank of Wyndmere* (1906), — N. D. —, 108 N. W. Rep. 546.

This decision is one stroke more in the "paring down" process which the doctrine that the drawee bank is presumed to know the signature of the drawer at its peril has undergone at the hands of the courts for the past century. The general rule is that money paid under mistake of fact may be recovered back however negligent the party paying may have been. Lord Mansfield engrafted an exception on this rule in 1762 in the case of *Price* v. *Neal*, 3 Burr. 1355, in which he held that the drawee is bound to know the signature of the drawer and so cannot recover back money paid on a forged draft. This rule has been followed for a long time both in England and the United States. *Redington* v. *Woods*, 45 Cal., 406; *Howard* v. *Mississippi Valley Bank*, 28 La. Ann. 727; *Mackintosh* v. *Eliot Nat. Bank*, 123 Mass. 393; *Frank* v. *Chemical Nat. Bank*, 84 N. Y. 209; *Levy* v. *Bank of U. S.*, 4 Dall. 234; *Bank of U. S.* v. *Bank of Georgia*, 10 Wheat. 333. The tendency of modern authorities is to limit and "pare down" this exception. Pennsylvania has abrogated it by legislative enactment (April 5, 1849); *People's Savings Bank* v. *Cupps*, 91 Pa. St. 315. Other jurisdictions have placed various limitations on it. Drawee can recover back money paid where there has not been absolute good faith on the part of the payee in communicating circumstances of suspicion known to him at the time of payment and not known to the drawee. *First Nat. Bank* v. *Ricker*, 71 Ill. 439; *Rouvant* v. *San Antonio Nat. Bank*, 63 Tex. 610. So where holder has been negligent in not making due inquiry as to the validity of the check before taking it, and the drawee has the right to presume that the holder had made such inquiry before paying it and is excused from making any inquiry himself before paying the check to the holder. *Ellis* v. *Ohio L. I. & T. Co.*, 4 Ohio St. 628. So too where the loss had already attached before the forged bill or check was paid and the drawee has given immediate notice to the holder after discovering the forgery. *McKleroy* v. *Southern Bank of Ky.*, 14 La. Ann. 458. Drawee may recover also unless his mistake as to the signature of the drawer has caused the holder some loss, or the paper has been taken by a bona fide holder subsequent to acceptance by the drawee. *First Nat. Bank* v. *First Nat. Bank*, 30 N. E. 808; *McKleroy* v. *Southern Bank of Ky.*, 14 La. Ann. 458. Generally, the exception applies only to cases where the party who received the money on the forged check has in no way contributed to the consummation of the fraud, or to the mistake of fact under which the payment was made. *National Bank of North Am.* v. *Bangs*, 105 Mass. 441; *Danvers Bank* v. *Salem Bank*, 151 Mass. 280. The earlier cases under the modern doctrine both in England and in this country required notice to be given with very great promptitude. *Cocks* v. *Masterman*, 1 Barn & Co. 902; *Bank of St. Albans* v. *Farmers and Mechanics' Bank*, 10 Vt. 141. But by the weight of modern authority in the United States mere lapse of time does not in itself bar the right of the drawee to recover back the money paid, if he gave notice and made demand within a reasonable time after the discovery of the forgery. *Koontz* v. *Central Nat. Bank*, 51 Mo. 275; *Bank of Commerce* v. *Union Bank*, 3 N. Y. 230; *White* v. *Continental Nat. Bank*, 64 N. Y. 316. As was said by

the learned judge in the principal case, the question as to the application of the exception to particular cases, heretofore has hinged on the degree of negligence shown by the holder of the forged instrument, the tendency being to hold a slight degree of negligence sufficient to take a case out of the operation of the exception. The principal case goes one step farther and practically does away with the exception altogether, save where the party receiving the money has been misled to his prejudice by the drawee's mistake.

BOUNDARIES—ARTIFICIAL BODIES OF WATER.—In 1872 H. and W. owned lots of land separated by a small brook. In that year the city took the brook and strips of adjoining land as a reservoir for the use of the fire department. In 1875 W. conveyed land "bounded on the south by the city reservoir" to defendant's grantor. In 1895 the city abandoned the reservoir and defendant took possession of so much of the land as was originally a part of the W. lot, claiming it under the deed of 1875. In 1904 W. conveyed these demanded premises to plaintiff. *Held,* the demanded premises did not pass under the deed of 1875. *Dillon* v. *Burke* (1906), — N. H. —, 63 Atl. Rep. 927.

In so holding the court does not follow the general rule that where land is bounded "by the pond" created by damming a stream, the grantee will take to the thread of the original stream, (*Mansur* v. *Blake,* 62 Me. 38; *Mill River Woolen Mfg. Co.* v. *Smith,* 34 Conn. 462; SHAW, Ch. J. in *Waterman* v. *Johnson,* 13 Pick. 261; *Lowell* v. *Robinson,* 16 Me. 357) but applies in the construction of this deed the presumption which ordinarily obtains where the granted premises are surrounded by other lands. No authorities are cited but the decision seems to be based upon the grounds that the reservoir had none of the characteristics nor could be subjected to any of the uses of the ordinary brook; that there was no evidence that the use of these two strips in connection with each other was necessary to the enjoyment of either; also that the reasons assigned for holding that it is more probable than otherwise the parties intended that the boundary line in a conveyance in which the granted premises are bounded by a highway or stream should be the center thereof, have no application to the facts of this case. In regard to this last proposition it does not seem that, in the absence of expressed intention, the grantor could be presumed to have intended that this triangular strip 30 feet in the front by 2½ feet in the back, subject to an indefinite easement, should not pass. Then, too, there is the old rule that the deed should be construed most strongly against the grantor.

CARRIERS—WHO ARE PASSENGERS—FRAUD IN SECURING CARRIAGE.—Plaintiff had procured at reduced rates a three months' ticket, good only for students under the age of eighteen years, by falsely representing that she was under eighteen and a member of a certain school, whereas she was over eighteen and not a student. She was injured through the negligence of defendant. *Held,* she was not a passenger. *Fitzmaurice* v. *New York, N. H. & H. R. R.* (1906), — Mass. —, 78 N. E. Rep. 418.

This is but a new application of the doctrine that fraud vitiates the contract and the party guilty of the fraud can have no benefits under the